JUL 1 1976

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Respondents.

and

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Petitioners,

vs.

LARRY G. HARDISON and TRANS WORLD AIRLINES, INC.,
Respondents.

CONSOLIDATED BRIEF FOR RESPONDENT LARRY G. HARDISON IN OPPOSITION

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TO: The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Court of Appeals is unreported except in 44 U.S.L.W. 2295 (8th Cir., December 16, 1975). The judgment and opinion of the District Court is reported at 375 F.Supp. 877 (W.D. Mo. 1974).

JURISDICTION

The opinion of the Court of Appeals was entered on December 16, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The establishment clause of the First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion. . . ."

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. §2000e(j) (1974).

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to . . . discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . religion. . . . 42 U.S.C. §2000e-2(a)(1) (1974).

Section 703(h) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. * * * 42 U.S.C. §2000e-2(h) (1974).

The Guidelines of the Equal Employment Opportunity Commission with respect to religious discrimination, 29 C.F.R. §1605.1, provide in pertinent part as follows:

* * *

> (b) The Commission believes that . . . section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees . . . where such accommodation can be made without undue hardship on the conduct of the employer's business.

(c) . . . [T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

STATEMENT OF THE CASE

The facts which are pertinent to this Court's consideration are set forth in detail in the District Court's opinion (Petitioner Unions' Appendix B; Petitioner Trans World Airlines, Inc.'s Appendix A; and the opinion of the United States Court of Appeals for the Eighth Circuit appearing as Appendix B in Petitioner Trans World Airlines, Inc.'s Petition in this cause). For the purposes of considering whether a Writ of Certiorari should be granted in this cause and for the convenience of this Court Respondent Hardison adopts a Statement of the Case as set forth by the Petitioners and by the District Court and the Appellate Court.

QUESTIONS PRESENTED

I. Should this Court grant a Writ of Certiorari when an employer who had the duty of participating in a "reasonable accommodation" to an employee's religious beliefs had not even attempted such an accommodation and therefore any alleged interference with the seniority rights of other employees would be purely speculative and conjectural and the problem does not in fact exist.

II. Should this Court grant a Writ of Certiorari to determine whether the Statute and guideline regarding religious discrimination in employment violates the Establishment Clause of the First Amendment to the Constitution of the United States of America when this Court has already granted a Writ on that exact same question.

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED TO EITHER PETITIONER

I

The question of whether "reasonable accommodation" requires the employer or union to breach the collective bargaining agreement or disregard seniority rights should not be considered as a reason for granting a Writ of Certiorari in this case because a "reasonable accommodation" of Respondent Hardison's religious beliefs which was possible by Respondent Trans World Airlines, Inc., yet not even attempted, would not have interfered with the seniority rights of other employees.

Both the Petitioner Unions and Petitioner Trans World Airlines, Inc., have argued to this Court that accommodation of Hardison's religious beliefs, and the effect of the decision of the Court of Appeals for the Eighth Circuit which is the subject of this Writ of Certiorari, would necessitate "bumping" employees with more seniority than Respondent Hardison. This representation is simply incorrect. The Court of Appeals for the Eighth Circuit expressly found that such a conflict could have been easily avoided by Trans World Airlines, Inc., and therefore did not have before it the question of the lack of availability of an accommodation so as to cause the employer to unavoidably conflict with the seniority provisions of the collective bargaining agreement. In fact, the Court found that the employer had several ways in which it could have accommodated Hardison's religious beliefs and still, in manifesting those accommodations, be *within* the framework of the seniority system of the collective bargaining agreement in question.

The Court of Appeals stated:

Alternatives Rejected

"(1) Within the framework of the collective bargaining agreement, TWA could have permitted Hardison to work a four-day week. Hardison was willing to do this, but the company would not agree because it would be short-handed during one shift. It conceded that a supervisor could be utilized or another worker on duty elsewhere could be transferred, but urged that this would cause some other shop function to suffer.

. . . The actual hours involved in this case did not even amount to a full shift, since Hardison had transferred to the twilight shift and would have worked from 3:00 p.m. on Friday until sundown (approximately 6:30 p.m.), thus further reducing the impact upon the company's operations.

(2) Another alternative within the framework of the collective bargaining agreement was for TWA to fill Hardison's Sabbath shift from other available personnel. This could be accomplished by holding a worker over from the last shift, calling a worker in early, or, more logically, assigning a worker from the pool of 200 employees qualified to do the work. TWA contended that this alternative would be an undue hardship because such workers must be paid overtime compensation. (A39 and A40 of Petitioner Trans World Airline, Inc.'s Appendix)

Thus, the Court found that the employer failed to pursue alternatives which were not in violation of the collective bargaining agreement and which were available. These alternatives cited above from the

Eighth Circuit Court of Appeals opinion did not require a deviation from the collective bargaining agreement. Petitioner Trans World Airlines, Inc., and Petitioner Unions would have this Court review the United States Court of Appeals for the Eighth Circuit's decision on a cause which they say is of national public interest and importance, yet never occurred. Thus, it is suggested by the Respondent Hardison that the decision of the Court of Appeals for the Eighth Circuit did not necessitate the Petitioner Trans World Airlines, Inc.'s breaching the collective bargaining agreement and therefore did not necessitate or cause any infringement of fellow employees' seniority rights who belonged to Petitioner Unions as did Respondent Hardison.

Further, the alternatives mentioned by the Court of Appeals, did *not* deviate from the collective bargaining agreement. While the Court noted that a "swap" might have been one manner in which Hardison's religious beliefs could have been accommodated, it was never established in this case that such a "swap" would have infringed upon another employee's seniority rights. As noted by the Court of Appeals, it may well have been that another employee might have volunteered to take Hardison's Sabbath shift. Yet this alternative was never pursued by the company in this case. Also, even though a special Union Relief Committee existed for the purpose of resolving problems over seniority variances for special situations, Hardison's problem was never even referred to that Committee.

With regard to the collective bargaining agreement the Court of Appeals concluded:

"It would seem that a collective bargaining agreement, the seniority provisions of which preclude

any reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act. We are not required to reach that point in this case, however, because the evidence is clear that TWA did not seek and the union therefore did not refuse to entertain a possible variance (emphasis added)." (Appendix of Petitioner Trans World Airlines, Inc., A43-A44)

Respondent Hardison therefore respectfully suggests to this Court that this is not a proper case to review because of the reason that there is not a conflict between an existing collective bargaining agreement and attempts by an employer to attempt or perform a reasonable accommodation to an employee's religious belief for the reason that no such attempt on the part of TWA ever occurred. There is no factual basis for the reason that the interpretation of the statute would result in innumerable recurrent nationwide problems in the administration of uniform work rules in collective bargaining agreements because that question was not decided by the Court of Appeals.

This Court's recent review of a case involving questions of seniority rights has offered sufficient guidance to unions and employers for the purpose of ascertaining what steps may be taken to reasonably accommodate an employee's religious beliefs within the duties imposed on the employer by Title VII.

In the case of *Franks* v. *Bowman Transportation Company, Inc.*, 495 F.2d 398, ... U.S. ...., No. 74-728, 12 FEP Cases 459 (1976), this Court recently addressed itself to questions of awarding seniority rights and back pay to properly make victims of discrimination whole. It is respectfully suggested that the

Court's reasoning in *Franks*, supra, should apply to an employer's compliance with the provisions of Title VII which pertain to religious discrimination in the employer-employee context where a collective bargaining agreement is present. In fact, the holdings of this Court in *Franks*, supra, answer the questions raised by Petitioner Unions and Petitioner Trans World Airlines, Inc., in their Petitions filed in this case. This Court stated in *Franks:*

> "Second and more fundamentally, it is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central 'make whole' objective of Title VII. These conflicting interests of other employees will of course always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. But as we have said, there is nothing in the language of Title VII, or in its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination, . . .
>
> Accordingly, we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. 'If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed. *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2nd Cir. 1971).' "

As this Court well recognized in *Franks*, supra, there will always be certain employee benefits which will be cherished and sought after. Certainly it could be conceded that "Saturdays off" is one of these benefits. Yet this benefit must yield, as must seniority, to the Congressional mandate imposed by Title VII, that employers not discriminate in employment on the basis of religion. Since this mandate includes the requirement that an employer and union must make reasonable accommodation of an employee's religious beliefs, then to the extent that those attempts at reasonable accommodation by an employer conflict with provisions of a collective bargaining agreement, those provisions must not prevail. The law must be paramount over any contract. Collective bargaining agreements have never been above federal law and it is suggested that the argument by Petitioner Trans World Airlines, Inc., and Petitioner Unions, that even without TWA attempting a reasonable accommodation a problem with the seniority agreement might arise is entirely conjectural. Such an argument attempts to place their agreement above the public policy enunciated by Title VII.

Further, even though the seniority provisions of an employer's collective bargaining agreement may not amount to "intentional" discrimination, the agreement is nonetheless subject to the requirements of Title VII. It is quite clear from previous decisions of this Court that no intentional discrimination need be shown but only the consequences of a discriminatory practice need be pointed out and hopefully remedied. The lack of intent to discriminate on the basis of religion does not absolve Petitioner Trans World Airlines, Inc., in this case nor does their excuse that Petitioner Unions would cause them difficulty relieve them from the duty to

participate in a reasonable accommodation. Nor does the recognition by the United States Court of Appeals for the Eighth Circuit of the discriminatory effect of the Unions' position in this case relieve the Petitioner Unions from allowing a reasonable accommodation even though it may conflict in part with their collective bargaining agreement.

Therefore, it is respectfully submitted to this Court that the argument of Petitioner Trans World Airlines, Inc., and Petitioner Unions presents nothing for review by this Court that has not already been enunciated by this Court and no guidance is necessary after the clear pronouncement which has been made regarding federal law taking precedence over collective bargaining agreements.

II

The statute and guideline do not violate the establishment clause of the First Amendment and even though that question has not been squarely decided by this Court that question has been preserved by the granting of a Writ of Certiorari presently before this Court.

This Court on March 20, 1976, granted a Writ of Certiorari to the Sixth Circuit Court of Appeals in the case of *Parker Seal Co.* v. *Paul Cummins*, No. 75-478, Certiorari granted .... U.S. ...., 44 L.W. 3493. It is respectfully submitted to this Court that a consideration by the Court in that case as to whether the statute and the guideline dealing with religious discrimination does or does not violate the establishment clause is sufficient to preserve the same argument by the Petitioners in this cause. It is Respondent Hardison's position that there need not be a duplication of

this Court's time in deciding the same questions. Therefore, although Petitioner Hardison takes the position that the statute and guideline question meet the three-part test set forth in *Committee for Public Education and Religious Education and Religious Liberty* v. *Nyquist*, 413 U.S. 757 (1973), it is sufficient to state that Petitioner Hardison's position regarding the claim of unconstitutionality is that Petitioners' claim is presently before the Court in the *Parker* case and should not be a reason for granting the Writ in this cause.

CONCLUSION

There is no reason to grant the Writ of Certiorari in this cause because there has never been a conflict actually presented in this case between the Petitioner Unions' collective bargaining agreement and the activity of Petitioner Trans World Airlines, Inc. Therefore their arguments are conjectural and have no basis in fact and should not support the granting of a Writ. Further, as to the constitutional claim, that issue is presently pending before the Court and no duplication is necessary. Both Petitioners have failed to establish any factual or sufficiently proper and important reasons why the Writ should be granted. For the reasons stated Respondent Hardison submits that a Petition for Writ of Certiorari on behalf of Petitioner Trans World Airlines, Inc., and Petitioner Unions should be denied.

Respectfully submitted,

WILLIAM H. PICKETT